BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

MANUEL M. MAGALLANES Claimant	)	
VS.	)	Docket No. 1,028,194
TYSON FRESH MEATS, INC. Self-Insured Respondent	)	

ORDER

STATEMENT OF THE CASE

Respondent requested review of the June 1, 2012, Award entered by Administrative Law Judge Brad E. Avery. The Board heard oral argument on August 22, 2012. Stanley R. Ausemus, of Emporia, Kansas, appeared for claimant. Gregory D. Worth, of Kansas City, Kansas, appeared for the self-insured respondent.

The Administrative Law Judge (ALJ) adopted the opinions of Dr. Huston as to claimant's percentage of new functional impairments and, therefore, found that claimant had a 2 percent permanent partial impairment to the whole body for his neck injury, a 3.5 percent permanent partial impairment to his right upper extremity, and a 3 percent permanent partial impairment to his left upper extremity as a result of this accident.[1] The ALJ further found that claimant was permanently totally disabled. The ALJ adopted the opinion of Dr. Lowry Jones in the prior claim and held that claimant had a 25 percent preexisting impairment to both his right and left upper extremities and that respondent was entitled to an offset for said preexisting disability. The ALJ computed the preexisting impairment using the 1994 compensation rate.[2] The ALJ further found that respondent was entitled to an offset for social security benefits paid to claimant based on the stipulation entered by the parties. The ALJ specifically noted that the claimant's testimony was credible.

---

[1] These are Dr. Huston's percentages after his percentage of preexisting was subtracted.

[2] Claimant's previous workers compensation claim for injuries to his bilateral shoulders was settled in 1994. That claim involved a series of accidents from September 17, 1991, to October 17, 1991.

The Board has considered the record and adopted the stipulations listed in the Award. The Board has also considered the Stipulation filed January 24, 2012, concerning claimant's average weekly wage, as well as the independent medical report of Dr. Joseph Huston filed with the Division on December 12, 2007.

ISSUES

Respondent argues the Board should adopt the opinion of Dr. Jeffrey MacMillan and hold that claimant only suffered a temporary aggravation of his preexisting shoulder injuries and no permanent injury or impairment to his cervical region. Accordingly, respondent asks the Board to find that claimant should be denied an award of permanent partial disability compensation and future medical treatment. Respondent further argues that the ALJ erred in finding a presumption of permanent total disability because claimant only suffered a partial loss of use, not a total loss of use, of his bilateral upper extremities. In the event the Board finds there was a presumption of permanent total disability, respondent contends the presumption was rebutted by the evidence in the record. Respondent further argues the ALJ improperly calculated the amount of credit it should receive for claimant's preexisting impairment by using the 1994 compensation rate rather than the 2006 compensation rate.

Claimant asks that the Board affirm the ALJ's Award in all respects.

The issues for the Board's review are:

(1) What is the nature and extent of claimant's disability, including his functional impairment?

(2) Was there a presumption of permanent total disability in this case because claimant suffered only a partial loss of use of his bilateral upper extremities rather than a total loss of use of his bilateral upper extremities?

(3) If the Board finds there was a presumption of permanent total disability, did the evidence show that the presumption was rebutted?

(4) Did the ALJ properly calculate the credit for preexisting impairment?

FINDINGS OF FACT

Claimant came to the United States from Mexico in 1964. He had 13 years of education in Mexico and was in the Mexican Army for two years before immigrating. He is a United States citizen, but he cannot speak much English. He had worked for respondent for about 20 years, most of that time as a painter and in maintenance.

Claimant had previously suffered injuries to his right and left shoulders in a series of accidents from September 17, 1991, to October 17, 1991. He filed two workers compensation claims. Claimant was evaluated on December 29, 1993, by Dr. Lowry Jones, who diagnosed him with glenohumeral arthritis, acromioclavicular joint arthritis, rotator cuff impingement and biceps tendonitis. Dr. Jones recommended restrictions that claimant work between chest and waist level and try to work close to his body. He also recommended that claimant limit activities above his head to no lifting and only occasionally lifting his arms to the shoulder level; do no repetitive pushing, pulling or reaching; limit any climbing activities; and not crawl. Dr. Jones rated claimant as having a 25 percent permanent partial impairment to each upper extremity. Claimant's two workers compensation claims from 1991 were settled on June 17, 1994, for a lump sum payment of $13,391.91 for accrued permanent partial disability and weekly payments thereafter of $94.69 for 272 weeks plus one payment of $67.61.[3] All issues, including future medical and review and modification, were to remain open only during the time the settlement was being paid out.

On January 17, 2006, when claimant was 64 years old, he suffered injuries to his neck and bilateral shoulders. Claimant testified that he had been sitting in a chair at a table waiting for a meeting to begin when a large coworker, Ed Snovelle, came into the room and attempted to pass behind claimant to get to a chair on the other side of him. Claimant's chair was only about 4 inches from the wall. Mr. Snovelle, however, attempted to climb over claimant to get past him. As he did, Mr. Snovelle pushed on claimant's shoulders, and claimant's head was twisted and pushed to the table.[4] Claimant left the meeting and went to the plant infirmary, complaining of head and shoulder injuries. He was treated with ice and pain medication.

Respondent sent claimant to see Dr. Chris Fevurly in February 2006, who sent claimant to physical therapy. Claimant said the therapy did not help. Claimant was later referred to Dr. Jeffrey MacMillan, a board certified orthopedic surgeon. He was first seen by Dr. MacMillan on November 29, 2006. Claimant complained to Dr. MacMillan of severe stabbing pain in the back of his neck that at times would radiate to behind his right ear. Claimant also complained of pain across the top of both shoulders. Claimant told Dr. MacMillan he had some shoulder problems several years earlier and that he had right shoulder surgery in the past but could not provide much in the way of the history of his prior treatment or diagnosis.

Dr. MacMillan performed a physical examination on November 29, 2006. Claimant had a fairly stiff neck and significant loss of shoulder motion with impingement signs.

---

[3] Those payments paid out approximately September 8, 1999.

[4] Claimant also testified that Mr. Snovelle stepped on his foot, but claimant is not alleging a work-related permanent injury to his foot in this claim.

Claimant also had some rotator cuff weakness in both shoulders. X-rays revealed claimant had degenerative disc changes at C5-6 and C6-7 and degenerative changes in the acromioclavicular joints and glenohumeral joints. MRIs of both shoulders taken March 10, 2006, showed claimant had fairly severe arthritis of both the acromioclavicular and glenohumeral joints.

After examining claimant, Dr. MacMillan diagnosed claimant with degenerative disc disease in his cervical spine, specifically at C5-6 and C6-7. He had bilateral shoulder osteoarthritis and bilateral shoulder impingement syndrome with probable rotator cuff tears. He also diagnosed claimant with arthritis and atherosclerotic disease in his foot.[5] Dr. MacMillan gave claimant a right shoulder steroid injection. He also started claimant on an oral anti-inflammatory arthritis medicine and sent him to physical therapy.

Claimant returned to Dr. MacMillan's office on December 27, 2006. Claimant said the injection seemed to improve his right shoulder pain. Claimant was given a second right shoulder injection and a left shoulder injection. Claimant was also told to continue with the oral anti-inflammatory medication. Claimant returned to see Dr. MacMillan on January 10, 2007, at which time claimant said he was experiencing considerable improvement of his shoulder symptoms. Claimant was again given injections in his shoulders.

Claimant returned to Dr. MacMillan on January 29, 2007, at which time claimant again reported improvement of his bilateral shoulder pain. Dr. MacMillan attributed the improvement to the injections. Dr. MacMillan said that shoulder pain often radiates up into the neck and the injections help distinguish the origin of an individual's symptoms. Dr. MacMillan's final diagnosis was that claimant had an aggravation of shoulder impingement syndrome. He did not believe that claimant suffered any injury to his neck in the accident. Dr. MacMillan concluded that claimant had reached maximum medical improvement. He believed claimant had returned to the baseline he had prior to the time of the January 2006 accident. Dr. MacMillan has not seen claimant since January 29, 2007.

Dr. MacMillan reviewed the December 29, 1993, report of Dr. Lowry Jones, after which he opined the January 2006 accident was an aggravation of the preexisting conditions as described by Dr. Jones in his December 1993 report. Dr. MacMillan said that claimant had no impairment for his shoulders over and above the ratings he had previously received from Dr. Jones.

Dr. MacMillan did not believe claimant suffered a permanent injury of any kind as a result of the January 2006 accident. That includes claimant's bilateral shoulders and

---

[5] Dr. MacMillan said when patients have atherosclerotic changes in the vessels in the foot, he worries about peripheral vascular disease. He added it is often a commentary about the quality of blood vessels that feed the heart.

cervical region. Dr. MacMillan believed claimant reported a temporary aggravation of preexisting degenerative problems in both his neck and shoulders.

Dr. Peter Bieri is board certified in disability evaluation. He examined claimant on June 7, 2007, at the request of claimant's attorney. Claimant described the accident of January 2006. Dr. Bieri noted claimant had conservative treatment and had been diagnosed with cervicothoracic strain aggravating degenerative joint disease of the neck. The rest of claimant's history was apparently confusing to Dr. Bieri.

Dr. Bieri conducted a physical examination of claimant. He stated that the claimant's attorney requested an examination of injuries to claimant's back and neck. He therefore limited his examination to the cervicothoracic spine.

Dr. Bieri said claimant described persistent pain in his neck radiating into his shoulders and down to his thoracic spine. Claimant said he wore a lumbar support, stating it made his back feel better. Although claimant complained of pain to his low back, Dr. Bieri said that would not be related to the accident in question, and he did not examine that area.

Claimant had moderate tenderness to diffuse palpation. He had marked active loss of range of motion in a nonuniform fashion that was self-limited to complaints of pain. Attempts at active range of motion were accompanied with brief, palpable muscle spasms, an objective finding, and muscle guarding of the neck, a subjective finding. Claimant had no muscle spasm at rest. Dr. Bieri was unable to achieve valid measurements in the range of motion testing to qualify for validity. Dr. Bieri mentioned a possible reason for the nonuniform range of motion studies could be pain or spasm. He acknowledged that another possible reason could be claimant was attempting to manipulate the outcome of the testing.

Dr. Bieri concluded that claimant had suffered an injury on or about January 17, 2006, that resulted in a diagnosis consistent with cervicothoracic strain, aggravating degenerative joint disease. Using the AMA *Guides*,[6] Dr. Bieri placed claimant in DRE cervicothoracic Category II, which correlates to a 5 percent permanent partial impairment to the whole body.

Dr. Bieri said claimant had been released from treatment with a restriction to avoid any shoulder level and overhead use of his upper extremities, and he agreed with that restriction. He did not impose any further restrictions related to claimant's cervical spine.

---

[6] American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

Dr. Bieri reviewed a task list prepared by Richard Santner.[7] Of the 5 tasks on the list, Dr. Bieri opined that claimant was unable to perform 1 for a 20 percent task loss.

Dr. Joseph Huston, a board certified orthopedic surgeon, evaluated claimant on November 30, 2007, at the request of the ALJ. On examination, claimant complained of discomfort with pressure over his cervical spine and into the trapezius towards the shoulder. Dr. Huston did not note any muscle spasm. Claimant complained of tightness and pain with range of motion testing of his cervical spine. Claimant had limited right shoulder motion.

After examining claimant and reviewing his medical records and x-ray reports, Dr. Huston opined that the injury claimant sustained on January 17, 2006, did not cause the majority of his abnormal findings in the neck and shoulders. He stated that claimant had significant preexisting problems.

Based on the AMA *Guides*, Dr. Huston rated claimant as having an 8 percent permanent partial impairment to the whole body for his neck. Dr. Huston rated claimant as having a 14 percent permanent impairment of his right upper extremity, which would translate to an 8 percent impairment to the whole person. Dr. Huston rated claimant as having a 12 percent permanent impairment of the left upper extremity, which converts to a 7 percent rating of the whole person. Claimant's whole body ratings would combine for a total of 21 percent to the body as a whole. Dr. Huston said that 75 percent of claimant's rating was due to claimant's preexisting problems and the remaining 25 percent would be the result of claimant's January 2006 accident.

Dr. Huston noted that claimant had significant restrictions and cannot be in a job that required frequent looking upward or looking to the right or left. Claimant's shoulder problems require restrictions of lifting, pulling, pushing and reaching. Dr. Huston said claimant should not lift more than 7 pounds with each hand. Claimant should not do any above shoulder work activities and pushing and pulling with either hand should be limited to 15 pounds.

At the time of the regular hearing in November 2011, claimant was in a wheelchair, partially because of a foot problem but also because he gets dizzy and falls. He said that condition has come on since the incident on January 17, 2006. Claimant testified he was still experiencing pain in his neck. His neck pain is located at the base of his skull on the right side of the neck. It hurts to move his head from side to side and from up to down. If he moves his head up and down, that is when he falls down. The pain in his neck runs towards his shoulders and spine. The pain is on the top of his shoulders. On his right, the

[7] Richard Santner, a vocational rehabilitation counselor, met with claimant on May 4, 2007, at the request of claimant's attorney. He prepared a list of 5 tasks that claimant performed in the 15-year period before his January 2006 injury. In Dr. Bieri's deposition at page 12, claimant's attorney mistakenly identifies the expert who prepared the task list as Doug Lindahl, Mr. Santner's partner.

pain goes to his shoulder blade. His shoulder pain is constant. His shoulders pop. Claimant has trouble sleeping because of the pain. Driving is a problem because he has trouble lifting his arms. He had none of the problems with his neck or shoulders before the incident in January 2006.

Steve Benjamin, a vocational rehabilitation consultant and job placement specialist, provided respondent with a labor market survey for claimant. The labor market survey was done in 60 mile radius of Emporia, Kansas. Mr. Benjamin found several jobs he believed claimant would be able perform within his restrictions with salaries beginning at $7.25 per hour. Mr. Benjamin admitted that the bulk of the jobs he elicited would be outside of the restrictions placed on claimant by Drs. MacMillan and Huston. More jobs would be available utilizing the restrictions of Dr. Bieri.

Mr. Benjamin did not meet with claimant at any time. He was not able to find out how much English claimant could speak or how well claimant could ambulate. He did not know that claimant was confined to a wheelchair. He acknowledged that at the time of his deposition, claimant would be 71 years old. He also acknowledged that claimant's injury and restrictions, age, and lack of ability to speak English fluently are factors that would limit claimant's ability to obtain a job in the present economy. But he believed that although claimant has barriers to re-employment, it would not be impossible for claimant to find a job. Mr. Benjamin opined that claimant was not permanently and totally disabled.

PRINCIPLES OF LAW

K.S.A. 2005 Supp. 44-501(a) states in part: "In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends." K.S.A. 2005 Supp. 44-508(g) defines burden of proof as follows: "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."

An accidental injury is compensable under the Workers Compensation Act even where the accident only serves to aggravate a preexisting condition.[8] The test is not whether the accident causes the condition, but whether the accident aggravates or accelerates the condition.[9] An injury is not compensable, however, where the worsening or new injury would have occurred even absent the accidental injury or where the injury is shown to have been produced by an independent intervening cause.[10]

---

[8] *Odell v. Unified School District*, 206 Kan. 752, 758, 481 P.2d 974 (1971).

[9] *Woodward v. Beech Aircraft Corp.*, 24 Kan. App. 2d 510, Syl. ¶ 2, 949 P.2d 1149 (1997).

[10] *Nance v. Harvey County*, 263 Kan. 542, 547-50, 952 P.2d 411 (1997).

K.S.A. 2005 Supp. 44-501(c) states:

> The employee shall not be entitled to recover for the aggravation of a preexisting condition, except to the extent that the work-related injury causes increased disability. Any award of compensation shall be reduced by the amount of functional impairment determined to be preexisting.

K.S.A. 44-510a provides:

> (a) If an employee has received compensation or if compensation is collectible under the laws of this state or any other state or under any federal law which provides compensation for personal injury by accident arising out of and in the course of employment as provided in the workers compensation act, and suffers a later injury, compensation payable for any permanent total or partial disability for such later injury shall be reduced, as provided in subsection (b) of this section, by the percentage of contribution that the prior disability contributes to the overall disability following the later injury. The reduction shall be made only if the resulting permanent total or partial disability was contributed to by a prior disability and if compensation was actually paid or is collectible for such prior disability. Any reduction shall be limited to those weeks for which compensation was paid or is collectible for such prior disability and which are subsequent to the date of the later injury. The reduction shall terminate on the date the compensation for the prior disability terminates or, if such compensation was settled by lump-sum award, would have terminated if paid weekly under such award and compensation for any week due after this date shall be paid at the unreduced rate. Such reduction shall not apply to temporary total disability, nor shall it apply to compensation for medical treatment.
>
> (b) The percentage of contribution that the prior disability contributes to the later disability shall be applied to the money rate actually collected or collectible for the prior injury and the amount so determined shall be deducted from the money rate awarded for the later injury. This reduced amount of compensation shall be the total amount payable during the period of time provided in subsection (a), unless the disability award is increased under the provisions of K.S.A. 44-528 and amendments thereto.

K.S.A. 44-510e(a) states in part:

> Permanent partial general disability exists when the employee is disabled in a manner which is partial in character and permanent in quality and which is not covered by the schedule in K.S.A. 44-510d and amendments thereto. The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was

> earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. Functional impairment means the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein. An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.

K.S.A. 44-510c(a)(2) defines permanent total disability as follows:

> Permanent total disability exists when the employee, on account of the injury, has been rendered completely and permanently incapable of engaging in any type of substantial and gainful employment. Loss of both eyes, both hands, both arms, both feet, or both legs, or any combination thereof, in the absence of proof to the contrary, shall constitute a permanent total disability. Substantially total paralysis or incurable imbecility or insanity, resulting from injury independent of all other causes, shall constitute permanent total disability. In all other cases permanent total disability shall be determined in accordance with the facts.

The determination of the existence, extent and duration of the injured worker's incapacity is left to the trier of fact.[11]

In *Wardlow*[12], the claimant, an ex-truck driver, was physically impaired and lacked transferrable job skills making him essentially unemployable as he was capable of performing only part-time sedentary work.

The court in *Wardlow* looked at all the circumstances surrounding his condition including the serious and permanent nature of the injuries, the extremely limited physical chores he could perform, his lack of training, his being in constant pain and the necessity of constantly changing body positions as being pertinent to the decision whether the claimant was permanently totally disabled.

In *Casco*,[13] the Kansas Supreme Court stated:

---

[11] *Boyd v. Yellow Freight Systems, Inc.*, 214 Kan. 797, 522 P.2d 395 (1974).

[12] *Wardlow v. ANR Freight Systems*, 19 Kan. App. 2d 110, 113, 872 P.2d 299 (1993).

[13] *Casco v. Armour Swift-Eckrich*, 283 Kan. 508, Syl. ¶¶ 7, 8, 154 P.3d 494 (2007).

> Scheduled injuries are the general rule and nonscheduled injuries are the exception. K.S.A. 44–510d calculates the award based on a schedule of disabilities. If an injury is on the schedule, the amount of compensation is to be in accordance with K.S.A. 44–510d.
>
> When the workers compensation claimant has a loss of both eyes, both hands, both arms, both feet, or both legs or any combination thereof, the calculation of the claimant's compensation begins with a determination of whether the claimant has suffered a permanent total disability. K.S.A. 44–510c(a)(2) establishes a rebuttable presumption in favor of permanent total disability when the claimant experiences a loss of both eyes, both hands, both arms, both feet, or both legs or any combination thereof. If the presumption is not rebutted, the claimant's compensation must be calculated as a permanent total disability in accordance with K.S.A. 44–510c.

ANALYSIS

Here, claimant suffered permanent injuries to his bilateral upper extremities in addition to the injury to his neck. Respondent contends the presumption of permanent total disability does not apply unless there is a total loss of use of the scheduled members. The Board finds that the presumption of permanent total disability announced in *Casco* applies regardless of whether an injured worker sustains a permanent partial loss of use of the scheduled members or a total loss of use. It is noteworthy that the claimant in the *Casco* case suffered only a partial loss of use of his bilateral shoulders, yet the Kansas Supreme Court determined that those injuries gave rise to a presumption that claimant was permanently totally disabled.[14]

In this case, the Board finds that claimant is not permanently and totally disabled. No physician testified that claimant's injuries rendered him unable to engage in substantial gainful employment. Moreover, Steve Benjamin, the only vocational expert to give an opinion on claimant's ability to find a job, opined that there were jobs available in the claimant's area which claimant was capable of performing within the restrictions of the physicians, including those recommended by Dr. Bieri and Dr. Huston. Also, claimant continued to work for respondent for almost 10 weeks after his accident.

Claimant suffered permanent injuries to his bilateral upper extremities and neck and sustained impairments of function over and above his preexisting condition. The Board agrees with and adopts the percentages of permanent impairment determined by Dr. Huston, including his opinions as to what portion of those percentage of impairments preexisted the January 17, 2006, injury.

---

[14] See *Copp v. State*, No. 107,192, unpublished Kansas Court of Appeals opinion filed August 31, 2012.

Because claimant suffered an injury to his neck in addition to his upper extremities, claimant's right to permanent partial disability compensation is governed by K.S.A. 44-510e rather than K.S.A. 44-510d. Permanent partial disability is defined by K.S.A. 44-510e as the average of claimant's wage loss and task loss. Claimant is not working, and therefore his actual wage loss is 100 percent. The only task loss opinion in this record is that given by Dr. Bieri of 20 percent. The Board will adopt that opinion. Averaging the 100 percent wage loss with the 20 percent task loss results in a work disability of 60 percent.

Unlike with the credit provided for in K.S.A. 44-510a, the 44-501(c) credit is not based on the actual dollars claimant received. The Board finds the ALJ erred by applying the 1994 compensation rate to the 44-501(c) credit in a claim for a January 17, 2006, accident. As opined by Dr. Huston, the credit for claimant's preexisting impairment is 16 percent.

Respondent is also entitled to a reduction in the amount of weekly permanent partial disability compensation due claimant for the amount of Social Security retirement benefits claimant is receiving, but in no event shall claimant receive less than the amount due for claimant's percentage of functional impairment for this accident, which is 5 percent to the body as a whole. Per the stipulation of the parties, claimant has received Social Security benefits in the following amounts:

From January 1, 2008, through December 31, 2008, a period of 52.29 weeks, claimant was paid Social Security benefits at the rate of $219 per week.

From January 1, 2009, through December 31, 2009, a period of 52.14 weeks, claimant was paid Social Security benefits at the rate of $231.69 per week.

From January 1, 2010, through February 22, 2010, 2010, (the date the award is paid out) a period of 7.57 weeks, claimant was paid Social Security benefits at the rate of $231.62 per week.

CONCLUSION

(1) Claimant has a 21 percent impairment of function to the body as a whole, 16 percent of which preexisted the accident of January 17, 2006, and 5 percent of which is attributable to that accident. Claimant has a 60 percent permanent partial work disability which, after subtracting the 16 percent preexisting impairment, results in an award for a 44 percent permanent partial work disability.

(2) & (3) The presumption of permanent total disability applies to this claim but has been rebutted by the evidence.

(4) The ALJ improperly calculated the credit for claimant's preexisting impairment.

The ALJ approved the fee agreement between claimant and his attorney. This file contains no attorney fee agreement between claimant and his current attorney as mandated by K.S.A. 44-536(b). As such, there can be no approval of that fee agreement. Should claimant's counsel desire a fee be approved, he must file and submit this written contract to the Director for approval.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Brad E. Avery dated June 1, 2012, is modified as follows:

Claimant is entitled to 44 weeks of temporary total disability compensation at the rate of $314.18 per week or $13,823.92 followed by 9.14 weeks of permanent partial disability compensation at the rate of $314.18 per week or $2,871.61 for a 5 percent functional disability, followed by 160.70 weeks of permanent partial disability compensation at the rate of $314.18 per week, less the Social Security offset, or $25,206.68, for a 44 percent work disability, making a total award of $41,902.21, to be paid out as follows:

From January 18, 2006, through March 22, 2006, a period of 9.14 weeks, claimant is entitled to permanent partial disability at the rate of $314.18 or $2,871.61, for a 5 percent functional impairment.

From March 23, 2006, through January 24, 2007, a period of 44 weeks, claimant is entitled to temporary total disability benefits at the rate of $314.18 or $13,823.92.

From January 25, 2007, through December 31, 2007, a period of 48.71 weeks, claimant is entitled to permanent partial disability at the rate of $314.18 or $15,303.71.

From January 1, 2008, through December 31, 2008, a period of 52.29 weeks, claimant is entitled to permanent partial disability at the rate of $95.18 ($314.18 minus Social Security offset of $219 per week), or $4,976.96.

From January 1, 2009, through December 31, 2009, a period of 52.14 weeks, claimant is entitled to permanent partial disability at the rate of $82.49 ($314.18 minus Social Security offset of $231.69 per week), or $4,301.03.

From January 1, 2010, through February 22, 2010, a period of 7.57 weeks, claimant is entitled to permanent partial disability at the rate of $82.56 ($314.18 minus Social Security offset of $231.62), or $624.98.

As of October 23, 2012 there would be due and owing to the claimant 44 weeks of temporary total disability compensation at the rate of $314.18 per week in the sum of $13,823.92, plus 169.84 weeks of permanent partial disability compensation at the rate of $314.18 per week, less the Social Security offset from January 1, 2008, forward, in the

sum of $28,078.29, for a total due and owing of $41,902.21, which is ordered paid in one lump sum less amounts previously paid.

IT IS SO ORDERED.

Dated this _____ day of October, 2012.

_____
BOARD MEMBER

_____
BOARD MEMBER

_____
BOARD MEMBER

c: Stanley R. Ausemus, Attorney for Claimant
kathleen@sraclaw.com

Gregory D. Worth, Attorney for the Self-Insured Respondent
mvpkc@mvplaw.com

Brad E. Avery, Administrative Law Judge